



**Wanjiku v Republic (Criminal Miscellaneous Application
E020 of 2021) [2024] KEHC 4594 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E020 OF 2021**

SM MOHOCHI, J

APRIL 24, 2024

BETWEEN

JOHN MWANGI WANJIKU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant, John Mwangi Wanjiku was charged, tried and convicted in Nakuru CM Criminal case no 4389 of 2011 of two counts of Robbery with Violence Contrary to Section 296 (2) and Rape contrary to Section 7 of the *Sexual Offences Act*. He was on the 21st March 2013, sentenced to 25 years imprisonment on both counts by Hon. J Mwaniki and feeling dissatisfied he appealed against Conviction and sentence in Nakuru HCRA no 58 of 2013.
2. The Applicant's Appeal was dismissed by Hon Maureen Odero J. and his sentence on count one (1) enhanced to the death sentence on the 2nd June 2017. Feeling aggrieved of the High Court judgment the Appellant preferred an Appeal before the Court of Appeal in Court of Appeal CR No 70 of 2017 which Appeal the Applicant withdrew to argue a re-sentence application Nakuru HCMISCCR No. 198 of 2018, Prof. j. Ngugi J. on the 27th May 2020 holding that the Court does not have jurisdiction to review a sentence and the Application was accordingly dismissed.
3. The Applicant moved this Court by filing two simultaneous Applications Nakuru HCMISCCR No.019 of 2021 and HCMISCCR No. E020 of 2010 claiming that he had a single sentence of imprisonment of 25 years which he pleaded that the same runs from the date he was remanded the two filed were consolidated.
4. Prof J Ngugi. J had on the 7th July 2022 sought a report from the prison authorities to clarify why the Applicant claimed to be serving an imprisonment sentence of 25 years. This order was ultimately filed after this Court re-issued the orders on the 27th February 2023.



5. On the 26th April 2023 Mr. Kemboi Advocate came on record and the Court directed the parties to file written submissions.
6. The Officer in Charge of Nakuru Prison filed copies of the sentence committal warrants dated 8th July 2022 confirming the two sentences of death for count one, and twenty-five years imprisonment for count two.
7. The Applicant on the 5th June 2023 sought the Courts leave to file a fresh Application and the Court allowed the amendment of the instant Application.
8. On the 17th January 2024 the Applicant filed a fresh application altogether and abandoned the previous Application.
9. On the 13th March 2024 the Applicant filed written submissions on its Application dated the 17th January 2024.
10. The Notice of Motion 13th March 2024 is ostensibly filed pursuant to Sections 216 and 329 of the Criminal Procedure Code and Articles 21(1), 22(1), 25(1), 50(2) and 165 (3) of the Constitution of Kenya and is supported by the Applicant's sworn Affidavit dated 7th January 2024.
11. The Application seeks the following reliefs;for Orders:
 - i. SPENT
 - ii. That, this Honorable Court be pleased to revise the current sentence of the applicant/convict and accord him a lenient sentence.
12. The Application is based on the following grounds: -
 - i. That, the Court be pleased to grant any further Orders geared at upholding substantive justice.
 - ii. That, the costs of this application be provided for.
 - iii. That, the applicant was sentenced to death vide an enhanced conviction issued vide Nakuru High Court Criminal Appeal No. 58 OF 2013.
 - iv. That, the appeal was as a result of Nakuru Chief Magistrate Criminal Case No. 4389 of 2011, where he had been sentenced to 25 years imprisonment.
 - v. That, the applicant had applied for Re-sentencing vide Nakuru Misc; Criminal Application No. 198 of 2018, where the trial Court then, held the belief and conception that the applicant had been sentenced to serve 25 years imprisonment, while in the real sense he had been sentenced to serve life imprisonment.
 - vi. That, the applicant is in jail due to a confusion of records and it is imperative that this Honorable Court grant him an opportunity once again in life to reintegrate in the society.
 - vii. That, the applicant has no appeal pending in any other Court of law, save for this application for re-sentencing.
 - viii. That, the applicant has really reformed in jail. He holds Diploma in Biblical studies, as well as Grade 2 in carpentry and joinery.



- ix. That, the applicant should be given an opportunity to re-unite with his family, whose arms are open to receive him at home and society at large.
13. The Applicant depones that, he was charged before Nakuru Law Courts Criminal Case No. 4389 of 2011. where he was sentenced to serve 25 years' imprisonment and elected to appeal the sentence and conviction vide Nakuru Criminal Appeal No. 58 of 2013 where his sentence was enhanced to death he appealed before the Court Appeal vide Court of Appeal No. 60 of 2017 and thereafter elected to withdraw the appeal so that he could pursue re-sentencing.
14. That he did his first re-sentence vide Misc, Criminal Application No. 198 of 2018 where the trial Court mis-understood his case, that he had been sentenced to death, and dosed the window of being re-sentenced.
15. That he all along had the belief that he had been sentenced to serve 25 years in prison, and that is why he did his earlier application under Section 333 of the Criminal Procedure Code to commute his sentence to run.
16. That he has learnt a lot of trades in prison he is a certified carpenter who holds Grade 2 in carpentry and ought to have proceeded but, fell ill mid-way hence left the trade. That he went back to class and obtained a diploma in Biblical Studies and he is a totally reformed man with a family ready to receive him back in society.

Determination

17. That this Court is bound by the Supreme Court Decisions and that it has the requisite jurisdiction under Article 165 to re-hear sentencing and impose an appropriate sentence for matters determined by the subordinate Court. In the *Francis Muruatetu case* rendered itself and declared the mandatory nature of death sentence unconstitutional and opened the case for those who had been sentenced to death to have a second bite at the pie through resentencing.
18. While the Applicant is resigned to his conviction he has in a spirited manner engaged this Court in multiple applications noting the sentence he is serving was imposed in explicit mandatory terms.
19. This Court observes that it has had the benefit of the Subordinate Court record giving rise to the sentence imposed and on the mitigating and aggravating circumstances.
20. I am therefore of the considered view that whereas the death sentence enhanced by the High Court was in mandatory terms and was enhanced with concession by the Applicant and his advocate, the High Court did not consider mitigation in the Subordinate Court and aggravating factors.
21. It was argued for the Applicant that the death sentence was no longer provided for, and so the Trial Court imposed an illegal sentence.
22. This, however, is a misinterpretation of the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. What the Court did was to remove the mandatory nature of the death sentence in Section 204 of the *Penal Code* for being inconsistent with the *Constitution*: and held that the Court has the discretion to impose a sentence other than death in accordance with the circumstances of the case. In my understanding, the death penalty is still prescribed in law.
23. This Court observes that, the ruling by Prof. J. Ngugi J. on the 27th May 2020 Nakuru HCMISCCR No. 198 of 2018 holding that the Court does not have jurisdiction to review a sentence imposed by the high Court was done before the Supreme Court gave guidance in the Francis Karioko Muruatetu 2.



24. Though the Muruatetu Judgment referred to murder, the Court of Appeal in in the case of William Okungu Kittiny v Republic ([2018] eKLR) confirmed that the same can also be applied in other cases where the law provides for a mandatory sentence where it was stated:

“...The appellatant was sentenced to death for robbery with violence under Section296(2). The punishment provided for murder under Section 203 as read with Section204andfor robbery with violence and attempted robbery with violence under Section296(2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence... is a discretionary ...”

25. This Court shall thus invoke Article 165 jurisdiction for the sole reason that the High Court in enhancing the Applicant’s Sentence did indicate that that was the only sentence available and that its imposition was in mandatory terms.
26. I therefore allow the application herein, and review the death sentence imposed against the Applicant on count (1) one and substitute the same with an imprisonment term of twenty-five years 25 years to run concurrently together with the 25-year imprisonment imposed on count two (2) from the 2nd December 2011 in accordance with the provision of Section 333(3) of the Criminal Procedure Code.

It is so ordered.

SIGNED, DATED and DELIVERED At NAKURU THIS 24TH DAY OF APRIL, 2024.

Mohochi S.M
(Judge)

